

STATE OF MICHIGAN
COURT OF APPEALS

In re ALBERT C. TOPOR TRUST.

STEVEN C. TOPOR, Trustee of the ALBERT C.
TOPOR TRUST and KATHLEEN A. WEYER,

UNPUBLISHED
May 12, 2011

Appellees,

v

MARIA HUMPHREY,

No. 297558
Midland Probate Court
LC No. 09-004208-TV

Appellant.

Before: DONOFRIO, P.J., and BORRELLO and BECKERING, JJ.

PER CURIAM.

Appellant appeals as of right an order entered denying \$4,370 in attorney fees to Warren Schur from the Albert C. Topor Trust. For the reasons set forth in this opinion, we affirm.

This case arises from a dispute over the handling of the Albert C. Topor Trust. The parties subsequently entered into a Settlement Agreement that mandated that a Special Master make a determination of the issue of payment of attorneys' fees from the trust. Following the Special Master's determination, the trial court entered an order consistent with the determinations. Appellant argues that the trial court erred in adopting the Special Master's determinations because (1) the legal analysis was flawed and (2) the Special Master erroneously reviewed the underlying facts of the case when preparing his report and determination.

This Court reviews the probate court's decision to award attorney fees for an abuse of discretion. *Stoudemire v Stoudemire*, 248 Mich App 325, 344; 639 NW2d 274 (2001).

It is well established that a settlement agreement is considered a contract that binds the parties. *In re Lobaina Estate*, 267 Mich App 415, 417-418; 705 NW2d 34 (2005). Further, courts are required to enforce unambiguous contracts according to their terms. *Quality Products and Concepts Co v Nagel Precision, Inc*, 469 Mich 362, 370; 666 NW2d 251 (2003); *Wilkie v Auto-Owners Ins Co*, 469 Mich 41, 51-52; 664 NW2d 776 (2003). "A court cannot 'force' settlements upon parties," *Henry v Prusak*, 229 Mich App 162, 170; 582 NW2d 193 (1998), or "enter an order pursuant to the consent of the parties which deviates in any material respect from

the agreement of the parties,” *Kloian v Domino’s Pizza LLC*, 273 Mich App 449, 461; 733 NW2d 766 (2006) (quoting *Scholnick’s Importers-Clothiers, Inc v Lent*, 130 Mich App 104, 112; 343 NW2d 249 (1983)).

The Settlement Agreement contains the following paragraphs:

8. The Trust will pay reasonable attorney fees to Barry B. George for representing Kathleen in this proceeding as determined by a special master appointed by the Court.

9. The Trust will pay reasonable attorney fees to Robert E. Bourne and Warren Schur for representing Maria in this proceeding as determined by a special master appointed by the Court

* * *

14. The covenants herein are exchanged for valuable consideration and are binding upon the parties.

The terms of the agreement are unambiguous. The language clearly indicates that the Special Master, appointed by the court, is required to determine reasonable attorney fees that will be paid by the trust to George, Bourne, and Schur. That is, the language states that the fees determined by the Special Master will be paid by the trust. The language does not indicate that the court’s approval is necessary or that the parties may object to the Special Master’s determinations. The agreement’s directive in paragraphs 8 and 9 is simple: the trust will pay reasonable attorney fees as determined by a special master.

Pursuant to the language of the Settlement Agreement, the court appointed George Phillips as Special Master and ordered him “to determine the issue of payment of attorney fees from the Trust.” The Special Master made a determination on the payment of reasonable attorney fees awarding Schur \$630 to be paid from the trust and directing Schur and/or appellant to return \$4,370 to the trust.¹ The Special Master also determined that Bourne and George were entitled to collect their entire fees from the trust. The court then entered an order consistent with the Special Master’s determinations on the issue of payment of attorneys’ fees from the trust. This is precisely what the language of the settlement agreement contemplates. Therefore, we hold that the Special Master’s determinations are binding upon the parties and any attempt by the court to supersede the determinations deviates in a material respect from the agreement of the parties. See *Kloian*, 273 Mich App at 461. Accordingly, the trial court did not abuse its discretion when it entered an order consistent with the Special Master’s determinations as directed by the Settlement Agreement.

¹ From the various documents submitted to the Special Master, he determined that Schur was paid a \$5,000 retainer from the trust. The Special Master also determined that Schur was only entitled to \$630 for the work he expended.

Appellant next argues that the Special Master's report and determinations were erroneous because the legal analysis was flawed and the Special Master examined the underlying facts, namely whether appellant carried out her duties as a prudent person. We conclude that the Special Master correctly based his determinations on MCL 700.7205, MCL 700.7401, and *In re Temple Marital Trust*, 278 Mich App 122; 748 NW2d 265 (2008). Trust administration is governed by Article VII of EPIC, MCL 700.7101 *et seq.* Under EPIC, a trustee has specific powers, and those powers must be performed in a reasonable manner. MCL 700.7401 provides, in pertinent part:

(1) A trustee has the power to perform in a reasonable and prudent manner every act that a reasonable and prudent person would perform incident to the collection, preservation, management, use, and distribution of the trust property to accomplish the desired result of administering the trust legally and in the trust beneficiaries' best interest.

(2) Subject to the standards described in subsection (1) and except as otherwise provided in the trust instrument, a trustee possesses all of the following specific powers:

* * *

(w) To employ an attorney to perform necessary legal services or to advise or assist the trustee in the performance of the trustee's administrative duties, even if the attorney is associated with the trustee, and to act without independent investigation upon the attorney's recommendation. An attorney employed under this subdivision shall receive reasonable compensation for his or her employment.

"Thus, provided a trustee acts as a reasonable and prudent person with respect to the trust, a trustee may retain counsel 'to advise or assist the trustee in the performance of the trustee's administrative duties,' § 7401(w), and to defend a claim or proceeding in any jurisdiction, § 7401(x)." *In re Temple Marital Trust*, 278 Mich App at 132. Further, an attorney employed to advise or assist the trustee is entitled only to reasonable compensation. MCL 700.7401(w). "[T]here exists no precise formula by which a court may assess the reasonableness of an attorney fee." *In re Temple Marital Trust*, 278 Mich App at 138. Rather, a court must consider multiple factors, including: (1) the skill, time and labor involved; (2) the likelihood, if apparent to the client, that the acceptance of the employment will preclude other employment by the lawyer; (3) the fee customarily charged in that locality for similar services; (4) the amount in question and the results achieved; (5) the expense incurred; (6) the time limitation imposed by the client or the circumstances; (7) the nature and length of the professional relationship with the client; (8) the professional standing and experience of the attorney; and (9) whether the fee is fixed or contingent. *Id.* (citing *Head v Phillips Camper Sales & Rental, Inc*, 234 Mich App 94, 114; 593 NW2d 595 (1999)).

In *In re Temple Marital Trust*, the Court underwent a two step analysis in determining whether the trustee's attorney was entitled to attorney fees paid from the trust. *In re Temple Marital Trust*, 278 Mich App at 133-139. The Court first considered whether the trustee acted in a reasonable and prudent manner in hiring the attorney. *Id.* at 136-137. In *In re Temple Marital*

Trust, the Court determined that the trustee acted in a reasonable and prudent manner when he hired the attorney. *Id.* Having found that the trustee acted reasonably and prudently, the Court then considered the question of reasonable compensation for the attorney hired by the trustee. *Id.* at 138. It is here that the Court considered the nine factors set forth above. *Id.*

In this case, appellant hired two attorneys to advise her in the administration of the trust and to defend a claim filed against her as trustee. She hired Schur, an out of state attorney, to assist her in the administration of the trust as evidenced by the letter Schur sent to appellee's attorney. She also hired Bourne to defend a claim filed against her as trustee. According to the record, Schur's first and only connection with this case occurred on May 5, 2009. This was in the form of a letter sent from Schur to George addressing appellee's request for an accounting. On June 25, 2009, Bourne filed an appearance on behalf of appellant.

Under *In re Temple Marital Trust*, the first inquiry is whether appellant acted reasonably and prudently in retaining counsel. The Special Master determined that appellant did not act in a reasonable and prudent manner when she hired and retained two attorneys, one being an out of state attorney, to assist her with the administration of the trust where the trust res and beneficiary were located in Midland, Michigan. Specifically, the Special Master noted, "if it was the trustee's preference to keep Mr. Schur on the job despite the extravagance of having multiple counsel, such a preference is beyond what would be expected of a reasonable and prudent person, and the expense of that extravagance should therefore fall on the trustee and not on the trust." The Special Master then determined that a reasonable payment for Schur would be \$225 per hour, a rate the Special Master determined as the average between the rates charged by Bourne and George, both Midland County attorneys. The Special Master determined that Schur expended a 1.8 hours in this case from May 21, 2009, to June 25, 2009, in drafting the letter. He ultimately determined that it was unreasonable for appellant to pay Schur a \$5,000 retainer from the trust and that Schur was entitled to only \$630 from the trust.

Contrary to appellant's contention, the Special Master's legal analysis adhered to the framework set forth in *In re Temple Trust*. The Special Master first made a determination regarding whether appellant acted in a reasonable and prudent manner in hiring two attorneys to represent her in the proceeding. The Special Master's findings were supported by the various documents submitted to him by the parties, i.e., the petition, appellant's and appellee's Request to Determine Attorney Fees, and the Settlement Agreement.

Appellant next argues that the Special Master's determinations were erroneous because he reviewed the underlying facts of this case finding that appellant failed to adequately perform her duties as trustee which was contrary to the recitals in the Settlement Agreement. Appellant does not provide any legal support for the argument that the Special Master should not have considered the underlying facts of the case to determine the attorneys' fees. Appellant's failure to adequately brief this issue or cite any authority supporting her position, renders this issue effectively abandoned on appeal. *Greater Bethesda Healing Springs Ministry v Evangel Builders & Const Managers, LLC*, 282 Mich App 410, 415-416; 766 NW2d 874 (2009). Even if we were to consider appellant's arguments, we find them to be without merit given that the Special Master acted in conformance with stated case law and the contractual mandates of the settlement agreement.

Appellant also argues that, by adopting the Special Master's determinations, the court altered the express terms of the Settlement Agreement. While appellant's contention that courts are not to rewrite the express terms of contracts is correct, appellant fails to identify what express terms of the Settlement Agreement the court altered by adopting the Special Master's determinations. *McDonald v Farm Bureau Ins Co*, 480 Mich 191, 200; 747 NW2d 811 (2008). To the extent appellant is arguing that the court's order altered the recital stating, "the Trustee acted with integrity and skill throughout her tenure, and that there was no indication whatsoever of mismanagement or actionable wrong," we disagree. The trial court entered an order consistent with the Special Master's determinations on the issue of payment of the attorneys' fees from the trust. This is precisely what the Special Master was to determine as agreed by the parties in the Settlement Agreement and as ordered by the court. The court subsequently ordered that:

1. Barry George's fees shall be paid in full either directly by the trust or, if tax or other considerations so indicate, the trustee should make a distribution to the sole beneficiary for the purpose of enabling her to pay those attorney fees.
2. Robert Bourne's fees shall be paid in full by the trust.
3. Warren Schur shall be paid \$630 for his fees. Since the former trustee has already aid \$5,000 out of the trust, the former trustee and/or Mr. Schur shall refund \$4,370 to the Albert C. Topor Trust by February 24, 2010.
4. George R. Phillips, Special Master, shall be paid \$1,705 by the trust for services rendered.
5. In all other respects the orders heretofore entered, not inconsistent with this order, shall remain in full force and effect.

The order does not alter any of the express terms of the Settlement Agreement. In fact, paragraph 5 of the order emphasizes that all prior orders shall remain in full force and effect. Moreover, this order does not contain any terms that are inconsistent with the Settlement Agreement. Specifically, the order does not assign any fault or potential liability to the trustee. Instead, the order executes paragraph 8 and 9 of the Settlement Agreement mandating the payment of reasonable fees to the attorneys as determined by the Special Master.

In sum, we hold that the trial court did not abuse its discretion when it entered an order consistent with the Special Master's determinations of the payment from the trust of attorneys' fees.

Affirmed. Appellees being the prevailing party may tax costs. MCR 7.219(A).

/s/ Pat M. Donofrio
/s/ Stephen L. Borrello
/s/ Jane M. Beckering